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SMALL BUSINESS ADMINISTRATION

13 CFR Part 115

RIN: 3245-AG39

Surety Bond Guarantee Program – Quick Bond Application and Agreement

AGENCY: Small Business Administration.

ACTION: Final Rule.

SUMMARY: The Small Business Administration (SBA) is issuing this final rule to amend its Surety Bond Guarantee (SBG) rules to implement a streamlined application process in the Prior Approval Program for contract amounts not exceeding \$250,000. This rule also makes minor administrative changes to the SBG Program regulations to, among other things, clarify the procedures for submitting application forms and paying fees, and deletes an obsolete reference to a form.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Brannon, Office of Surety Guarantees, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416; 202-205-6545, email: barbara.brannon@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background Information

Through the Surety Bond Guarantee (SBG) Program, SBA guarantees bid, payment, and performance bonds for contracts up to \$2 million for small and emerging contractors who cannot obtain bonds through regular commercial surety channels. SBA's

guarantee provides the incentive needed for sureties to bond these contractors, giving them greater access to contracting opportunities. The SBG Program consists of the Prior Approval Program and the Preferred Surety Bond (PSB) Program. In the Prior Approval Program, Sureties must apply to SBA for each bond guarantee and must receive SBA approval before issuing bonds. Sureties in the PSB Program can issue SBA guaranteed bonds without SBA's prior approval.

On February 6, 2012, SBA published a notice of proposed rulemaking with request for comments in the Federal Register to implement a streamlined application process in the Prior Approval Program for contract amounts not exceeding \$250,000, and to make other minor administrative changes to the SBG Program regulations, including clarifying the procedures for submitting application forms and paying fees, and deleting an obsolete reference to a form. See 77 FR 5721. The comment period was open until April 6, 2012, and SBA received three comments, two from trade associations and one from a contract bond underwriter. All submitters expressed support for the proposed rule, observing that it is consistent with industry practice, and two commenters commended SBA for its efforts to reduce the paperwork burden on contractors and sureties. The trade associations believe that the streamlined process will reduce costs associated with the SBG Program, which may lead to greater participation. One submitter offered suggestions for program enhancements, including changes to the current fee structure and to the notice requirements related to changes in the contract amount. These suggestions are outside the scope of this rule; however, SBA will take them into consideration in the context of any future program review.

Under this new streamlined process involving contracts not exceeding \$250,000, the Surety will use the new Quick Bond Guarantee Application and Agreement, SBA Form 990A, which consolidates two of the forms currently used in the SBG Program – SBA Form 990, Surety Bond Agreement and SBA Form 994, Application for Surety Bond Guarantee Assistance. The new process complements the existing industry practice of offering a streamlined bond application for smaller contract amounts. In addition, under this new process, SBA will not require the Principal to complete and submit two other forms for these small contract amounts, including SBA Form 994F; Schedule of Work in Process, and SBA Form 413; Personal Financial Statement. Instead, to mitigate any risk associated with these smaller contract amounts, the new SBA Form 990A requires the Principal to provide a list of the three largest contracts completed in the last 5 years. This final rule also sets forth the circumstances under which SBA Form 990A cannot be used.

This final rule also makes other changes to the existing SBG Program rules, including clarifying that SBA Form 990 or SBA Form 990A must be submitted to and approved by SBA prior to the Surety's execution of the bond (except for bonds issued under surety bonding lines). With respect to the rules regarding surety bonding lines, this final rule removes the reference to SBA Form 994C as this form is no longer used. In addition, with this final rule, SBA is making minor and technical modifications to clarify that Sureties and Principals may make fee payments through electronic means. The Department of Treasury has directed that payments be made by electronic funds transfer when cost-effective, practicable, and consistent with statutory authority. *See* 31 CFR 206.4. The final rule makes minor changes to the language in 13 CFR 115.32(b) and

115.32(d) to provide Sureties and Principals with the flexibility to make these payments electronically, conforming these provisions to the Department of Treasury's requirements.

II. Section-by-Section Analysis

Section 115.10. This section amends the definition of the term "Prior Approval Agreement" to add the "Quick Bond Guarantee Application and Agreement (SBA Form 990A)" to the agreements into which a Prior Approval Surety may enter with SBA. No changes have been made to this provision as proposed.

Section 115.30(d)(1). SBA amends this paragraph to clarify that, where the Surety Bond Guarantee Agreement (SBA Form 990) is used, it must be approved before the Prior Approval Surety executes a Bid or a Final Bond, except in the case of a bonding line under § 115.33(d). This is consistent with 13 CFR 115.19(f), which provides that SBA may deny liability under its guarantee if the Surety executes the bond prior to the date of SBA's guarantee. SBA is also amending this paragraph to clarify that the applicable guarantee fees must be paid in accordance with 13 CFR 115.32. No changes have been made to this provision as proposed.

Section 115.30(d)(2). This new provision implements a streamlined application process for bond guarantees for contracts that do not exceed \$250,000. Under this new process, applicants use a new form, the "Quick Bond Guarantee Application and Agreement (SBA Form 990A)" in place of SBA Form 990 and SBA Form 994. This new provision requires that the Quick Bond Guarantee Application and Agreement (SBA Form 990A) be submitted to and approved by SBA before the Surety executes the Bid or Final Bond. This provision also requires that the guarantee fees be paid in accordance

with 13 CFR 115.32. This provision also sets forth six circumstances under which this streamlined application process may not be used. No changes have been made to this provision as proposed.

Section 115.32(b). SBA amends the fourth sentence of this provision to add the requirement that the Principal's fee be remitted to SBA with the new SBA Form 990A, just as it is required to be submitted with SBA Form 990. In addition, SBA is making minor modifications to the rule as proposed to give the Sureties and the Principals the flexibility to pay the fee electronically through the Pay.gov website managed by the U.S. Department of Treasury's Financial Management Service. These modifications include deleting the word "together" in the sentence to avoid any suggestion that the payment must be made by a paper check that is attached to the SBA Form 990, and deleting the phrase "by the Surety" to clarify that the payment may be made by either the Surety or the Principal. By deleting the word "together", SBA does not intend to change the requirement that the Principal's fee be remitted before the guarantee application may be approved.

Section 115.32(c). SBA amends this paragraph to clarify that the requirements regarding the guarantee fee paid by the Surety apply to the new SBA Form 990A, just as they apply to the SBA Form 990. No changes have been made to this provision as proposed.

Section 115.32(d)(1). SBA is deleting the words "Supplemental Form 990" from this paragraph to make it clear that this provision applies to bond guarantees approved under the new SBA Form 990A in addition to SBA Form 990. SBA is also adding a sentence to provide that, in notifying SBA of any increase or decrease in the Contract or

bond amount, the Surety must use the same form that it used in applying for the original bond guarantee. No changes have been made to this provision as proposed.

Section 115.32(d)(2). SBA is making minor modifications to the rule as proposed by revising this provision to give Principals and Sureties the flexibility to remit the required fees electronically through the Pay.gov website. The modifications include deleting the word “check” throughout the provision.

Section 115.33(d). SBA is eliminating references to the “Surety Bond Guarantee Review Update (SBA Form 994C)” throughout this provision because the form is no longer used. No changes have been made to this provision as proposed.

Compliance with Executive Orders 12866, 12988, 13132, and 13563, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601 – 612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule does not constitute a significant regulatory action under Executive Order 12866. This final rule is also not a major rule under the Congressional Review Act.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this final rule will not have substantial, direct effects on the States, on the relationship between the

national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA has determined that this final rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13563

For the purposes of Executive Order 13563, SBA discussed implementing a streamlined application process with several surety industry associations and surety company representatives. The final application reflects the feedback received from these sources, particularly the incorporation of best practices used throughout the surety industry. SBA also solicited public comments as part of the standard rule making process. Those comments are described above.

Paperwork Reduction Act, 44 U.S.C. Ch 35

SBA has determined that this final rule imposes additional reporting and recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35. SBA included a request for comments on the Quick Bond Guarantee Application and Agreement (SBA Form 990A) in the proposed rule that was published in the Federal Register on February 6, 2012 at 77 FR 5721. The agency received three comments in response to this request during the 60-day comment period. All of the submitters expressed support for this streamlined bond guarantee application process, including the belief that it would reduce the burden on sureties and small business contractors. SBA has not modified this information collection; it is the same as described in the proposed rule. As required by law, SBA has submitted SBA Form 990A to the Office of Management and Budget (OMB) for review and approval. The information submitted to

OMB for review is available at

<http://www.reginfo.gov/public/jsp/PRA/prDashboard.jsp>.

A summary description of this information collection, the respondents, and the estimate of the annual hour burden resulting from this new process is provided below. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering the data needed, and completing and reviewing the responses.

Title: Quick Bond Surety Guarantee Application and Agreement (SBA Form 990A).

Description: The Quick Bond Surety Guarantee Application and Agreement is a combination application and bond guarantee agreement that would be used in the Prior Approval Program for contract amounts that do not exceed \$250,000. It is a streamlined alternative to the existing surety bond application and agreement, the SBA Forms 990 and 994 (OMB Control Number 3245-0007). The information would be used to evaluate whether the applicant small business meets the program eligibility criteria and the likelihood that it will successfully complete performance on the contract.

OMB Control Number: New Collection.

Description of and Estimated Number of Respondents. This proposed new collection would be submitted by small businesses seeking to obtain a bond in order to bid or perform on a contract, and by surety companies and their agents or representatives. Based on the current volume of bonds for contracts up to \$250,000, SBA estimates that approximately 500 small businesses and 13 Prior Approval Sureties would submit this streamlined application and agreement form.

Estimated Response Time: It is estimated that each applicant would require approximately 5 minutes to complete the proposed new form.

Estimated Number of Responses: 4,450. This number is based on SBA's projection of program activity during Fiscal Year 2012.

Total Estimated Annual Hour Burden: 369 hours.

Estimated Annual Cost Burden: \$18,941.

Regulatory Flexibility Act, 5 U.S.C. 601-612

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant impact on a substantial number of small entities. Within the meaning of RFA, SBA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. There are 13 Sureties that currently participate in the SBA Prior Approval Program, and no part of this final rule would impose any significant additional cost or burden on them.

List of Subjects in 13 CFR Part 115

Claims, Reporting and recordkeeping requirements, Small businesses, Surety bonds.

For the reasons stated in the preamble, SBA amends 13 CFR Part 115 as follows:

PART 115 – SURETY BOND GUARANTEE

1. The authority citation for part 115 continues to read as follows:

Authority: 5 U.S.C. app. 3; 15 U.S.C. 687b, 687c, 694a, 694b note, Pub. L. 106-554; Pub. L. 108-447, Div K, Sec. 203; Pub. L. 110-246, Sec. 12079, 122 Stat. 1651; and Pub. L. 111-5, 123 Stat. 115.

§ 115.10 [Amended]

2. In § 115.10 amend the definition of “Prior Approval Agreement” by adding “or Quick Bond Guarantee Application and Agreement (SBA Form 990A)” after “(SBA Form 990)”.

3. Amend § 115.30 by revising paragraph (d) to read as follows:

§ 115.30 Submission of Surety’s guarantee application.

* * * * *

(d) Prior Approval Agreement. To apply for a bond guarantee, a Prior Approval Surety must submit one of the following forms:

(1) Surety Bond Guarantee Agreement (SBA Form 990). A Prior Approval Surety may complete and submit a Surety Bond Guarantee Agreement (SBA Form 990) to SBA for each Bid Bond or Final Bond, and this Form must be approved by SBA prior to the Surety’s Execution of the bond, except in the case of a surety bonding line approved by SBA under § 115.33(d). The guarantee fees owed in connection with Final Bonds must be paid in accordance with § 115.32.

(2) Quick Bond Guarantee Application and Agreement (SBA Form 990A) -- (i) General procedures. Except as provided in paragraph (d)(2)(ii) of this section, a Prior Approval Surety may complete and submit the Quick Bond Guarantee Application and Agreement (SBA Form 990A) to SBA for each Bid Bond or Final Bond, and this Form must be approved by SBA prior to the Surety’s Execution of the bond. SBA Form 990A

is a streamlined application form that may be used only for contract amounts that do not exceed \$250,000 at the time of application. The guarantee fees owed in connection with Final Bonds must be paid in accordance with § 115.32.

(ii) Exclusions. SBA Form 990A may not be used under the following circumstances:

(A) The Principal has previously defaulted on any contract or has had any claims or complaints filed against it with any court or administrative agency;

(B) Work on the Contract commenced before a bond is Executed;

(C) The time for completion of the Contract or the warranty/maintenance period exceeds 12 months;

(D) The Contract includes a provision for liquidated damages that exceed \$250 per day;

(E) The Contract involves asbestos abatement, hazardous waste removal, demolition, or timber sales; or

(F) The bond would be issued under a surety bonding line approved under § 115.33.

4. Amend § 115.32 as follows:

a. Revise the fourth sentence of paragraph (b) to read as follows;

b. Revise the second sentence of paragraph (c) to read as follows;

c. Amend the second sentence of paragraph (d)(1) by removing the words “(Supplemental Form 990)” and add a new sentence at the end of paragraph (d)(1) to read as follows; and

d. Revise paragraph (d)(2) to read as follows. .

§ 115.32 Fees and Premiums.

* * * * *

(b) * * * The Principal's fee is rounded to the nearest dollar, and is to be remitted to SBA with the form submitted under either § 115.30(d)(1) or (2).

(c) * * * Subject to § 115.18(a)(4), the Surety must pay SBA a guarantee fee on each guaranteed bond (other than a Bid Bond) within 60 calendar days after SBA's approval of the Prior Approval Agreement. * * *

(d) * * *

(1) * * * In notifying SBA of any increase or decrease in the Contract or bond amount, the Surety must use the same form (SBA Form 990 or SBA Form 990A) that it used in applying for the original bond guarantee.

(2) Increases; fees. The payment for the increase in the Principal's guarantee fee, which is computed on the increase in the Contract amount, is due upon notification of the increase in the Contract or bond amount under this paragraph (d). If the increase in the Principal's fee is less than \$40, no payment is due until the total amount of increases in the Principal's fee equals or exceeds \$40. The Surety's payment of the increase in the Surety's guarantee fee, computed on the increase in the bond Premium, must be submitted to SBA within 60 calendar days of SBA's approval of the Prior Approval Agreement, unless the amount of such increased guarantee fee is less than \$40. When the total amount of increase in the guarantee fee equals or exceeds \$40, the Surety must remit the fee within 60 calendar days.

* * * * *

5. Amend § 115.33 by revising paragraphs (d)(1) and (d)(2) to read as follows:

§ 115.33 Surety bonding line.

* * * * *

(d) * * *

(1) Bid Bonds. Within 15 business days after the Execution of any Bid Bonds under a bonding line, the Surety must submit a “Surety Bond Guarantee Underwriting Review” (SBA Form 994B) to SBA for approval. If the Surety fails to submit the form within this time period, SBA’s guarantee of the bond will be void from its inception unless SBA determines otherwise upon a showing that a valid reason exists why the timely submission was not made.

(2) Final Bonds. Within 15 business days after the Execution of any Final Bonds under a bonding line, the Surety must submit a Surety Bond Guarantee Underwriting Review (SBA Form 994B) and a Surety Bond Guarantee Agreement (SBA Form 990) to SBA for approval. If the surety fails to submit these forms within the time period or the guarantee fees are not paid in accordance with § 115.32, SBA’s guarantee of the bond will be void from its inception unless SBA determines otherwise upon a showing that the Contract is not in default and a valid reason exists why the timely submission was not made.

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Dated: July 2, 2012

Karen G. Mills,
Administrator.

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